

STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
v.) **Case No. 05-cv-329-GKF(PJC)**
)
TYSON FOODS, INC., et al.,)
)
 Defendants.)

**STATE OF OKLAHOMA’S RESPONSE IN OPPOSITION TO AL SAUNDERS’
MOTION TO QUASH SUBPOENA [DKT #2640]**

COMES NOW Plaintiff, the State of Oklahoma (“State”), and for its response in opposition to non-party Al Saunders’ (“Saunders”) Motion to Quash Subpoena and Brief in Support [DKT #2640], respectfully submits that the Motion should be denied for the reasons stated herein.

I. SAUNDERS HAS NOT PRESENTED A COMPELLING REASON TO QUASH THE TRIAL SUBPOENA

Saunders asks this Court to relieve him of his requirement to testify at trial pursuant to subpoena; alternatively, he requests that the Court order that his testimony be taken between November 6 and 20, 2009. The basis for Saunders' Motion is two-fold. First, Saunders complains that having to testify at trial prior to November 6, 2009 would result in an undue burden. Second, Saunders complains that having to testify in Tulsa while birds occupy his barns violates state law and results in an unreasonable business risk, i.e., that of losing an entire flock of birds.

Whether a subpoena should be quashed is left to the sound discretion of the trial court. *Gulley v. Orr*, 905 F.2d 1383, 1386 (10th Cir. 1990). The authorities cited by Saunders recognize that the party moving to quash a subpoena bears a heavy burden of proof. *Mangla v.*

University of Rochester, 168 F.R.D. 137, 140 (W.D.N.Y. 1996). The law imposes an obligation on all witnesses to provide their testimony. *Fisher v. Ford Motor Co.*, 178 F.R.D. 195, 199 (N.D. Ohio 1998). Courts have refused to make exception for hardship, inconvenience, unfairness, or professional status. *Id.*

Both *Mangla* and *Fisher* dealt with physicians who were subpoenaed to give deposition testimony and who moved to quash the subpoenas, complaining of inconvenience and asking that they be paid for their attendance in excess of the statutory witness fee. As none of the physicians in either case was to testify as an expert witness, the courts refused to quash the subpoenas and determined that, absent other agreement, each would be paid only the statutory witness allowance despite the fact that the amount was far less than the physicians would normally earn in a day.

In *Culp v. Devlin*, 78 F.R.D. 136 (E.D. Pa. 1978), the court was asked to enter a protective order and prohibit the depositions of two defendants, one of whom was the mayor and the other, the police commissioner. Denying the defendants' motion, the court held: "Although this Court recognizes that the defendant Mayor and Police Commissioner are busy officials and such depositions might burden their schedules, these considerations do not outweigh the importance of allowing discovery to go forward." *Id.* at 141. In a later case from the same district, the district court refused to quash or modify a trial subpoena, stating that the witness's claim of being placed in an "awkward position vis-à-vis the public, her career, and her employer" was not sufficient hardship to justify quashing the subpoena. *Owens v. QVC*, 221 F.R.D. 430, 432 (E.D. Pa. 2004).

In the instant case, Saunders complains that compliance with the subpoena will require him to violate both state law and his contract with his integrator, amounting to undue burden.

Mr. Saunders' own deposition testimony, however, belies these stated concerns. First, Saunders previously testified in deposition that his wife, Beverly Saunders, could stay at home and watch the chickens while he went to educational meetings or classes. (*See* Deposition of W.A. Saunders, Vol. II at 208:19-209:4 (attached as Exhibit A).) Second, Saunders has testified that he may take vacation during which time someone else watches the birds day-to-day. (*See* Deposition of W.A. Saunders, Vol. I at 43:8-20 (attached as Exhibit A).) Surely, such amount of time would greatly exceed the handful of hours required for Saunders to provide trial testimony in Tulsa. Thus, if it is possible for someone other than Saunders to watch the birds while he attends educational classes or goes on vacation, then it should be possible for someone other than Saunders to watch them so that he may provide trial testimony pursuant to a trial subpoena.

The State has given Saunders ample notice and time within which to arrange for either Mrs. Saunders or another person, possibly the field man the integrator regularly sends to Saunders' farm, to watch over the poultry operation while he testifies at trial. Moreover, Saunders has not presented any authority to support the notion that leaving the operation in the hands of another person, which he obviously has done before, is in any way a violation of the law of bailment or would constitute a failure to provide food and shelter for the birds.¹

II. CONCLUSION

Based on the foregoing, Saunders' Motion should be denied, and he should be ordered to appear to testify at trial as scheduled.

¹ The State commits that it will use its best efforts to schedule Saunders' testimony between November 6 and 20, 2009, but that it may not be able to do so in light of the Court's trial schedule. The State must be able to present its evidence in a cohesive and sensible manner within the schedule set forth by the Court.

Respectfully Submitted,

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I hereby certify that on this 13th day of October, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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